ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of the Cable	)	CS Docket No. 97-248
Television Consumer Protection	)	
and Competition Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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SUMMARY

RCN Telecom Services ("RCN"), through its subsidiaries, is a facilities-based provider of video, local and long-distance telephone, and Internet access to residential consumers in Boston, New York City, Pennsylvania, and in the near future, the Washington, D.C. metropolitan area. RCN is growing rapidly and entering new markets aggressively. Most recently, RCN in partnership with a PEPCO subsidiary was certified to establish a regional open video system ("OVS") in the D.C. metropolitan area.

While RCN is expending millions of dollars to challenge cable incumbents, a key to its success thus far and to its future as a viable competitor is its ability to offer programming comparable to that offered by the local incumbents. The program access rules are critical to protect RCN's ability to enforce its right to non-discriminatory access to programming, without which it could not survive. In order to foster competition in the video marketplace, it is critical that the Commission seek to make programming available to the maximum degree possible.

Unfortunately, cable operators have little incentive to comply even with the current program access rules. The long period of time required for the Commission to resolve a complaint, coupled with the likelihood that cable operators will not be punished for failure to comply, diminishes the impact the rules have on anti-competitive behavior of cable operators. Further, because discovery is not generally available to video providers who allege discrimination by cable operators, video providers often lack the evidence necessary to establish a program access violation. Thus, unless the Commission's program access rules and the penalties associated with infractions are modified, cable operators will continue to gain more from stalling the efforts of new copetitors than from complying with the rules. Further, loopholes exist that allow vital programming to be sheltered from the program access rules. First, vertically-intergrated cable operators can evade the rules by using terrestrial rather than satellite delivery. Second, much of the popular programming now available is not subject to the

program access rules because it is not owned by a vertically integrated operator, but by a broadcast network or an independent programmer.

Access to programming is the catalyst that drives competition in the video market. In order to ensure the continued viability of market competitors, the Commission should: (1) impose short time limits on its resolution of program access complaints; (2) provide for discovery in program access disputes; (3) impose meaningful penalties for violations of the program access rules; (4) extend the program access rules to all programming regardless of how it is delivered, and at the very least extend the rules to programming that has been moved from satellite to terrestrial distribution with the effect of hindering or preventing access to that programming; and (5) extend the program access rules to include programming that is not delivered by a vertically-integrated cable operator.

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RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, respectfully submits the following comments in the above-captioned proceeding.

I. INTRODUCTION

RCN Telecom Services, Inc. ("RCN"), through its subsidiaries, is a facilities-based provider of local and long-distance telephone, video and Internet access to residential markets in Boston, New York, Pennsylvania, and in the near future, the Washington, D.C. metropolitan area. Apart from its specific views, RCN commends the Commission for initiating this proceeding. The importance of competitive entry in the video marketplace is self-evident. The success of such entry is crucially dependent on the ability of new entrants to acquire a full range of programming and to acquire it at reasonable, non-discriminatory prices.

RCN has committed substantial resources to challenging cable monopolies by bringing video service to consumers in a growing number of markets using both traditional cable systems and open video systems ("OVS"). The impact of RCN's entry into these markets is striking. For example, in the Boston area RCN's presence has served to steady rates. While Time Warner

recently announced rate hikes of up to 17 percent in some Massachusetts markets, it exempted from the rate hike only Somerville (near Boston) where RCN competes for customers. Instead of increasing rates in Somerville, Time Warner is holding rates steady and planning a new marketing approach.[1] Time Warner's vice president of government and community relations is reported to have said that Time Warner is responding by "looking at a whole new competitive pricing system" and "facing how we deal in a competitive environment for the first time."[2]

RCN's competitive presence will provide consumers with the benefits of competition, including improved service and lower rates. In addition to its existing open video systems in the Boston area and in Manhattan, RCN, in partnership with Potomac Capital Investment Corporation (PCI), an unregulated subsidiary of Potomac Electric Power Company (PEPCO), has recently been certified to establish a regional OVS system in the D.C. metropolitan area. RCN's plans to integrate telephony, high speed data, Internet access and video distribution will require hundreds of millions of dollars of investment capital. RCN, together with its affiliates and its partners has committed itself to this level of investment and has already made a substantial start.

Yet, a key to success thus far and to RCN's future as a viable competitor is its ability to offer programming comparable to that offered by the local incumbents. RCN relies on the Communications Act[3] and on the program access rules[4] to enforce its right to non-discriminatory access to programming. As the Commission has recognized, "[a]ccess to programming [is] one

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[1] Attached hereto is RCN's Supplemental Answer to a complaint filed by Time Warner against an RCN affiliate which is developing an OVS in the Boston metropolitan area. The Supplemental Answer provides further details on the unusual circumstances in Somerville.

[2] Bruce Mohl, *Increases set for 1998 cable rates: Hiking at two companies to average more than 10%*, Boston Globe (Nov. 26, 1997).

[3] *See* § 628 of the Communications Act of 1934, as amended.

[4] 47 U.S.C. § 548. *See also* 47 C.F.R. §§ 76.1000-1004.

of the most critical factors for the successful development of the MVPD marketplace."[5] Indeed, a competitor's very survival may turn on its access to certain key programming -- particularly regional sports programming. In New York City, for example, a multi-channel video programming distributor ("MVPD") unable to offer Knicks basketball games or Ranger hockey games would simply be unable to compete in the market.

As Congress recognized when drafting the program access provisions, large cable operators exercise a great deal of market power.[6] New competitors, such as RCN, must bargain with these cable giants to gain access to the programming necessary to attract subscribers. Unfortunately, despite the program access rules, bargaining disparities between cable giants and new competitors continue to threaten the growth of nascent competition. Most importantly, cable operators have little incentive to comply with the Commission's program access rules. The deterrent effect of the rules is hampered by the fact that there is no limit on the amount of time the Commission may spend considering a dispute, discovery is generally not available for complainants trying to prove a case, and the penalties currently available are too minor and too seldom imposed to be meaningful. Thus, unless the Commission's program access rules and the penalties associated with infractions are modified, cable operators will continue to gain more from stalling the efforts of new competitors than from complying with the rules.

Further, loopholes exist that allow vital programming to be sheltered from the program access rules. First, vertically-integrated cable operators can evade the rules by moving the distribution of their programming from satellite to terrestrial delivery. Second, much of the popular programming now available is not subject to the program access rules because it is not owned by a vertically integrated cable operator, but by a broadcast network or an independent programmer.

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[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report (Jan. 2, 1997) ("1996 Competition Report") ¶ 4.

[6] *See generally,* S. Rep. No. 102-92, 102nd Cong., 1st Sess. 25 (1991).

The Commission should bolster the program access rules by imposing time limits for the resolution of complaints, providing for discovery in program access disputes, and imposing meaningful penalties for violations of the rules. Further, the Commission should extend the rules to all programming regardless of the method by which it is delivered and irrespective of its origin.

II. THE COMMISSION SHOULD IMPOSE A SHORT DEADLINE FOR DECISIONS ON PROGRAM ACCESS COMPLAINTS

RCN agrees with Ameritech that the Commission should amend its rules to provide a short deadline for issuance of decisions on Section 628 complaints.[7] While Section 628(f)(1)[8] directed the Commission to provide for expedited review of program access complaints, the Commission did not establish time limits within which to decide these complaints.[9]

RCN agrees with the following Ameritech proposals: (1) the Commission should amend its rules to require decisions to be rendered within 90 days of the filing of the complaint, except in cases where the complainant has elected discovery, in which case the deadline for decision should be within 150 days of the filing of the complaint;[10] (2) the Commission should reduce the answer and reply periods applicable to program access proceedings to 20 and 15 days

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[7] *Petition for Rulemaking to Amend 47 C.F.R. § 76.1005 -- Procedures for Adjudicating Program Access Complaints,* Petition for Rulemaking of Ameritech New Media ("Ameritech Petition") (May 16, 1997) at 10.

[8] 47 U.S.C. § 548(f)(1).

[9] *See* Ameritech Petition at 10.

[10] Ameritech Petition at 14; *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, RM No. 9097, Memorandum Opinion and Order and Notice of Proposed Rulemaking (rel. Dec. 18, 1997) ("NPRM") at ¶ 38.

respectively;[11] and (3) the Commission should require answers to contain "copies of programming agreements and other documentary evidence of practices challenged in the Complaint."[12] Further, the Commission should implement a universally applicable time limit, rather than a separate time limit in cases involving denial of programming and a longer limit for price discrimination cases.[13]

The 90 and 150 day time periods suggested by Ameritech are sufficient for full exposition and consideration of the issues presented in a typical program access complaint. The reduction in time allowed for answers and replies will further serve to accelerate the process particularly where relevant materials, such as contracts, are attached. Finally, while simple cases of program denial may be less complicated to resolve than price discrimination cases, the proposed time limits are long enough to allow consideration and resolution of either type of case. As Ameritech has noted, inordinately long resolution periods harm complainants and stunt the growth of competition.[14] Although the Commission's policy has been to encourage "resolution of program access disputes through negotiated settlements in an effort to avoid time-consuming, complex adjudication,"[15] such a hands-off approach again reinforces the existing balance of bargaining power in favor of incumbents.

RCN agrees with Ameritech that delay weakens the bargaining position of competitors,[16]

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[11] Ameritech Petition at 15-16; *see* NPRM at ¶ 40.

[12] Ameritech Petition at 15.

[13] *See* NPRM at ¶ 39.

[14] *See* Ameritech Petition at 13.

[15] NPRM at ¶ 37 (citing *Consumer Satellite Systems, Inc., et al. v. United Video Satellite Group, Inc.*, 11 FCC Rcd 7428, 7429 (1996); *National Rural Telecommunications Cooperative v. EMI Communications Corp.*, 10 FCC Rcd 9785 (1995)).

[16] *See* Ameritech Petition at 14.

especially where the contested issue is price. It may be in the financial interest of a competitor to pay a discriminatory high price for programming rather than lose the chance to attract new subscribers during the time period necessary to resolve the complaint through the Commission. This is particularly true in cases where programming is so vital to consumers that they refuse to sign up with a service unable to offer it. Each day that the new competitor cannot offer a "must have" program is a day that the incumbent signs up new subscribers who may otherwise have chosen the competitive service. Reducing the amount of time required for resolution of a program access complaint is a critical step toward leveling the playing field for new entrants to the video distribution market. A shorter time period would force cable monopolists to bargain in good faith or face immediate consequences and would spur competition by speeding programming to competitors and their subscribers.

III. THE COMMISSION SHOULD ESTABLISH A RIGHT TO DISCOVERY FOR ALL PROGRAM ACCESS COMPLAINTS

RCN agrees with Ameritech that the Commission should amend its rules to allow the right to discovery in all Section 628 program access complaint proceedings.[17] While the Commission has the discretion to order discovery in program access complaints, it has exercised this authority only twice.[18] Discovery is an important tool that the Commission should use to foster competition in the video marketplace. Access to MSO information, such as the rates it charges to its own affiliates and others, is critical to establishing a price discrimination case. Without this information, a competitor is hampered in its ability to prove to the Commission that discrimination exists.[19] Proprietary information could be protected through use of the

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[17] *Id.* at 17.

[18] NPRM at ¶ 44 (citing *NRTC v. EMI*, 10 FCC Rcd 9785 (1995); *Consumer Satellite Systems v. CNN*, CSR 4676-P, CSR 4677-P, CSR 4678-P (consolidated 1996)).

[19] This is true despite the fact that in discrimination cases involving a complaint filed by an MVPD "based on information and belief of an impermissible rate differential, supported by an

standardized protective order suggested by the Commission.[20]

The NPRM inquired whether "different standards for discovery should be applied to different types of program access complaints, such as price discrimination, exclusivity, and denial of programming."[21] Since all of these practices can have an equally deleterious effect on competition, discovery should be allowed "as of right" regardless of the behavior alleged. RCN disagrees with the Commission's assertion that discovery as of right is inconsistent with Congressional intent and Ameritech's goal of expeditiously disposing of program access complaints.[22] To the contrary, discovery as of right would have the effect of discouraging discriminatory acts in the first instance because cable operators would be aware that their discriminatory behavior would be revealed. Finally, if the complaint in fact reached the Commission, the Commission would already have full access to the factual information necessary to determine the merits of the case. In many cases, a review of the discovered information would make obvious that discrimination had occurred and the complaint could quickly be resolved. In closer cases, the Commission would have at its disposal the information necessary to analyze the merits of the case and reach a speedy decision.

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affidavit, along with a statement that the vendor refused to provide the necessary specific comparative information," the Commission takes allegations as true for purposes of complainant establishing a prima facie showing of discrimination. (*Implementation of §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3417 (1993) ("Program Access Order"). The affidavit necessarily can provide allegations only of behavior known to be true, but without discovery the complainant cannot adequately allege the extent of the wrongful behavior. Further, the Commission would be better situated to make an informed determination if the full extent of the discrimination were known.

[20] *See* NPRM at ¶ 43, Appendix A: Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

[21] NPRM at ¶ 43.

[22] *See Id.* at ¶ 44.

As suggested by the Commission,[23] RCN believes it would speed the discovery process to require complainants to submit their discovery requests along with their program access complaints and require defendants to submit their requests and objections with their answer. Complainants would then submit their objections with their reply. Discovery in every case would enhance competition by discouraging discriminatory behavior and, when it did occur, aid complainants in establishing a case and the Commission in quickly determining the merits of the case.

IV. THE COMMISSION MUST IMPOSE MEANINGFUL PENALTIES FOR VIOLATION OF THE PROGRAM ACCESS RULES

RCN agrees with Ameritech that the Commission should impose economic penalties for violations of the program access rules.[24] The imposition of meaningful penalties is a necessary component of successful enforcement of the rules. In the absence of meaningful penalties, cable operators lack adequate incentive to comply with the rules. Currently cable operators who refuse to comply, and are thus the object of a complaint, can rest assured that even if the complaint is resolved against them, they have not suffered a loss, but have achieved a gain -- the ability to offer programming to their subscribers during a time period when it was not available to competitors. Viewed this way, it makes economic sense for a cable operator to deny programming until forced to provide it. The only parties injured by a refusal to provide programming are competitive providers and consumers.

The present system of forfeitures is inadequate to deter cable operators from refusing to comply with the rules. First, these forfeitures are an empty threat, as they are not in practice relied on by the Commission. For example, in one recent program access case the Commission

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[23] *See Id.* at ¶ 42.

[24] *See* Ameritech Petition at 19-24.

found that price discrimination had occurred, but failed even to discuss imposing penalties.[25] In another case where the Commission found that the defendant unreasonably refused to sell its programming to the complainant, the Commission declined to impose sanctions, but observed that if the defendant did not comply with its Order to provide non-discriminatory programming, the Commission would "not foreclose" the imposition of remedies.[26] Second, even if used, the penalty of $7,500 per violation presently provided in the Commission's guidelines[27] is too small to have a meaningful effect on the behavior of cable operators. A $7,500 per day penalty could be considered a cost of doing business to a cable operator with annual revenue of $106,000,000 to $5,860,000,000.[28] To underscore the paltriness of this penalty, the guideline amount of $7,500 per violation is approximately one millionth (.0001%) of $5,860,000,000, TCI Communications' annual revenue. For this small price, a cable operator could smother competition and continue to dominate the market, gaining subscriber revenue in perpetuity.

Thus, the current system of forfeitures even if used is not a sufficient threat to deter bad conduct. Further, damages calculated by, for example, amount of harm done also may not reach a sufficiently high level to deter unlawful conduct. For example, if as the Commission suggests, damages were based on the difference between the rate the complainant was charged and the rate the complainant should have been charged,[29] the cable operator is only required to refund an ill-

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[25] *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Property Holdings, Inc.*, Order, DA 97-2040 (rel. Sept. 23, 1997). The Commission did, however, state in a footnote that it has the authority to create a damages remedy but has declined to do so. *See Id.* at n. 67.

[26] *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation,* Order, 12 FCC Rcd 9892 (CSB 1997).

[27] *See* 47 C.F.R. § 1.80(b)(4) Note, §I.--Base Amounts for Section 503 Forfeitures.

[28] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 97-141 (Jan. 13, 1998) ("1997 Competition Report") at Appendix B-12, Table 7B (1996 Cable Industry Revenue and Cash Flow Calculations).

[29] NPRM at ¶ 47.

gotten windfall. This is not a deterrent to bad behavior. In light of the fact that forfeitures, and perhaps even damages measured in the ways suggested by the Commission, are too small to have an adequate deterrent effect, the Commission should use the power granted it by Congress[30] and recognized by the Commission[31] to levy more meaningful penalties. As Congress intended, these penalties should be in addition to the penalties provided by Title V.[32]

For maximum effect, and in keeping with the Commission's stated policy of encouraging parties to resolve their disputes before they reach the Commission,[33] we agree with Ameritech that penalties should be assessed from the date the competitive provider notifies the cable operator of its intention to file a complaint.[34] This policy is reasonable because, if the complaint is ultimately resolved in favor of the defendant, the defendant pays nothing. If the complaint is resolved in favor of the complainant, resolution is evidence that the complainant was harmed from the date it notified the defendant of its intention to file a complaint. Further, the date of notice to the defendant of complainant's intention to file provides the defendant fair opportunity to comply with the rules and thus resolve the matter.

Because RCN seeks immediate access to programming in the markets it enters, so that it

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[30] Section 628(e) grants the Commission the power to "order appropriate remedies" for program access violations. 47 U.S.C. § 548(e).

[31] The Commission has concluded that its authority to award remedies is broad enough to include damages. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, ("Order on Reconsideration"), 10 FCC Rcd 1902, 1911 (1994).

[32] Section 628(e)(2) states that "The remedies provided in paragraph (1) [authorizing the Commission to order remedies] are in addition to and not in lieu of the remedies available under title V or any other provision of this Act." 47 U.S.C. § 548(e)(2).

[33] NPRM at ¶ 37 (citing *Consumer Satellite Systems, Inc., et al. v. United Video Satellite Group, Inc.*, 11 FCC Rcd 7428, 7429 (1996); *National Rural Telecommunications Cooperative v. EMI Communications Corp.*, 10 FCC Rcd 9785 (1995)).

[34] *See* Ameritech Petition at 22-23.

can begin competing as soon as possible, any penalty system it advocates is designed not to make the wrongdoer merely refund its ill-gotten gain, but rather to deter wrongful discrimination in the provision of programming. RCN seeks to ensure that adequate incentives exist for cable operators to comply with the program access rules in the first instance. If the rules are not complied with, RCN seeks a quick resolution of the complaint. To that end, RCN recommends that the Commission adopt a system of stringent penalties, escalating during the period of time during which the cable operator refuses to provide programming in compliance with the rules. Further, due to the fact that a flat system may deter smaller operators, but be meaningless to larger ones, these penalties should be tied to a defendant-specific indicator, such as a percentage of revenue, such that cable operators are deterred by an amount proportional to their worth. If it elects not to impose these stringent penalties, the Commission should, at the very least increase the forfeiture amount in its guidelines to the maximum per day penalty of $27,500. As noted above, both Congress and the Commission have recognized the Commission's authority to provide broad remedies. Considering that "remedies" include "the means by which a right is enforced or *the violation of a right is prevented*" (emphasis added), [35] the Commission is also authorized to impose remedies designed to deter unlawful behavior.

In sum, the forfeiture penalties currently available are simply an empty threat -- never used and not substantial enough even if they were to deter behavior. In order to prevent program access violations and spur competition, the Commission should vigorously enforce a stringent system of meaningful penalties designed to deter wrongful behavior and to speed programming to the marketplace.

[35] *Black's Law Dictionary* (6th ed.1991).

V. THE COMMISSION SHOULD EXPAND ITS PROGRAM ACCESS RULES TO APPLY TO PROGRAMMING DELIVERED BY METHODS OTHER THAN SATELLITE

The program access rules should be expanded to apply to programming regardless of the method by which it is delivered. At the least, the Commission should expand the rules to apply to programming that is moved from satellite to terrestrial distribution in an effort to evade the rules. As the Commission is aware, the important protections provided in the rules currently apply only to satellite-delivered programming. Satellite programming, however, may be converted to terrestrial delivery in an effort by cable operators to exempt it from the program access rules.[36] The Commission itself has recognized the danger that arises from this loophole which allows cable operators to switch distribution technologies "for the purpose of evading the Commission's rules concerning access to programming,"[37] and has observed that improved terrestrial distribution technology may enable this evasive maneuvering and necessitate modification of its rules.[38]

Events demonstrate that the Commission's concerns were warranted and that "'fiber evasion' is becoming a reality."[39] In a move that would allow it to avoid the program access rules, Comcast has acquired Philadelphia sports teams with the intention of providing sports

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[36] Given the difficulty of proving intent, RCN urges the Commission to expand the rule without reference to the intent of the distributor who has chosen to substitute terrestrial for satellite distribution. The anti-competitive effect of the shift would be adequate. *See* 47 U.S.C. § 548(b) and n. 48 *infra*.

[37] 1997 Competition Report at ¶ 231 (citing 1996 Competition Report, 12 FCC Rcd at 4435 ¶ 154).

[38] *Id.*

[39] *See* Comments of BellSouth, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CD Dkt. No. 97-141 (July 23, 1997) at 15.

programming via methods other than satellite.[40] Sports programming is absolutely critical for new competitors because many subscribers buy video service primarily or exclusively for the purpose of watching sports. Without local sports programming, a new competitor simply cannot gain a foothold in a market and may eventually be eliminated. Comcast's action is the subject of a complaint filed against it by DIRECTV alleging that Comcast deliberately attempted to circumvent the program access rules.[41] Comcast's attitude toward the program access rules was evidenced by Brian Roberts, Comcast's president in a magazine article concerning whether it was possible to "capitalize on an apparent loophole in the 1996 Telecommunications Act in order to lock up the Philly area's sports programming."[42] Roberts said "We don't like to use the words 'corner the market,' because the government watches our behavior . . . . Let's just say we've been able to do things before they're in vogue."[43]

Cablevision, which has a "virtual monopoly" over New York sports[44] also has flouted the program access rules. The New York Times reported that:

> Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.[45]

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[40] *See* Statement of Charles W. Ergen, CEO of Echostar Communications, Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the U.S. House of Representatives Commerce Committee on Video Competition (Oct. 30, 1997) ("House Video Competition Hearing") at 6.

[41] *DIRECTV, Inc. v. Comcast Corporation, Comcast-Spectator, L.P. and Comcast SportsNet*, File No. CSR-5112-P (filed September 23, 1997).

[42] *The New Establishment -- Vanity Fair's Fifty Leaders of the Information Age*, Vanity Fair, October 1997, at 166.

[43] *Id.*

[44] Geraldine Fabrikant, *As Wall Street Groans, A Cable Dynasty Grows*, New York Times, April 27, 1997 at Section 3-1.

[45] *Id.*

Recently, Cablevision CEO Jim Dolan was asked whether Cablevision was "still looking at doing a fiber-distributed network to tiptoe around program-access rules?" Dolan responded:

> A more direct answer to your question is that we don't want to develop programming and make huge investments into programming that we then have to give away for little or nothing to a competitor, so that they can come into our marketplace and attempt to be equal with our company. That is just not good business . . . particularly when it comes to the issue of program access and regional networks that are not satellite-fed.[46]

Indeed, evidence that cable operators are looking to move programming off satellite to avoid the rules has become so widespread that Congress is now holding hearings on the topic. At a House Telecommunications Subcommittee hearing on video competition, Chairman Tauzin initiated a line of questioning on the topic, specifically inquiring as to whether there is a deliberate "attempt to avoid the effect of the law by distributing programs other than by satellite," and if so, whether it is becoming a trend.[47]

In light of the fact that cable operators are moving to evade the rules by switching distribution technologies, the Commission should act swiftly to protect competition that is emerging in many markets. The Commission has the authority to do so. Section 628(b) of the Communications Act prohibits a cable operator from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."[48]

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[46] Marianne Paskowski and Kent Gibbons, *After Busy Year, Dolans Eye Next Moves*, Multichannel News, December 1, 1997 at 1.

[47] House Video Competition Hearing, Federal News Service Transcript at 15.

[48] 47 U.S.C. § 548(b). The Commission has interpreted Section 628(b) to mean that the elements of a program access violation include a demonstration that the "purpose or effect" of the conduct is to "hinder significantly or to prevent" MVPDs from gaining access to programming. Program Access Order at 3374 ¶ 41.

Moving satellite programming to terrestrial facilities seems to serve no purpose other than to circumvent the program access rules. RCN, based on its significant experience, is not persuaded that delivering programming this way is less expensive, more efficient, easier to maintain, or provides a higher quality picture than delivery via satellite. Moving satellite programming to terrestrial delivery does, however, have the purpose or effect of hindering or preventing MVPDs from providing that programming to subscribers. Even where the cable operator's purpose in changing technologies cannot be established, it will always be the case that movement of programming off satellite has the effect of denying a guarantee of programming to competitors under the current rules.[49] Thus, because Section 628(b) requires only that the effect of the move is to restrict programming, the Commission should use its authority to extend the rules to all programming moved off satellite.

Indeed, the Commission has found that it is empowered to use Section 628(b) to circumscribe any conduct that emerges as a barrier to competition:

> Section 628 (b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.[50]

The transformation of "satellite cable" programming to non-satellite programming clearly has emerged as a barrier to competition and an obstacle to its distribution. Programming moved off satellite is satellite programming -- the very programming Congress and the Commission sought to make available to competitors. Thus, the Commission has the authority to extend the program access rules to this programming. Further, the Commission should consider whether its authority would allow it to extend the rules to all programming, regardless of its method of delivery.

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[49] *See* n. 36, page 12, *supra.*

[50] *Id.*

In addition to its authority to expand the program access rules under Section 628(b), the Commission also has broad authority under Section 4(i) of the Communications Act[51] to address evasion of its rules. Section 4(i) provides that "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the executions of its functions."[52] The Commission has interpreted this provision to give it authority to "properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions."[53]

Preventing the transfer of programming from satellite to terrestrial distribution, though not expressly referred to in the Act, is necessary to accomplish the Commission's function of providing non-discriminatory access to satellite programming. This in turn will reduce the necessity of regulating the distribution of programming and allow the market to function effectively. By the same token, extending the rules to cover all programming, regardless of its method of delivery, may also be within the Commission's authority. Doing so will foster competition in the video marketplace and thus further Congress' mandate in the 1996 Telecommunications Act[54] to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[55]

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[51] 47 U.S.C. §154(i).

[52] *Id.*

[53] *Telecommunications Services Inside Wiring, Customer Premises Equipment*, FCC CS Docket 95-184; *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking (Oct. 17, 1997) FCC 97-376 at ¶ 83.

[54] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[55] H.R. Conf. Rep. 104-458, 104th cong., 2nd Sess (Jan. 31, 1996) at 1.

The Commission should modify its rules to cover non-satellite delivered programming and thus fulfill both its mandate and Congress' intent that it stimulate competition in the video marketplace.

VI. THE PROGRAM ACCESS RULES SHOULD BE APPLIED TO ALL PROGRAMMING

The Commission did not seek comment on whether the program access rules should be extended to non-vertically integrated programmers who deny MVPDs access to programming.[56] The Commission stated that there is insufficient evidence as to the effect "that exclusive arrangements involving non-vertically integrated programmers may have on competition in local markets for the delivery of multichannel video programming."[57] RCN, however, urges the Commission to recognize the harmful effect that denial of programming by non-vertically integrated programmers can have on competition.

First, changes in the marketplace since the enactment of the program access provisions have resulted in the exemption of an increasing amount of programming and thus threaten the development of competition. When Congress enacted the program access provisions, most of the popular cable programming targeted for non-discriminatory access was owned by vertically integrated cable operators. An increasing amount of staple programming, however, is independently owned and therefore exempt from the rules. This increase is due in large part to evolutions in the industry, such as Viacom (owner of MTV, Nickelodeon and The Movie Channel) spinning off its cable system holdings. By separating programming from distribution, Viacom removes its programming from the rubric of the program access rules. As feared,

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[56] *See* NPRM at ¶ 36.

[57] *Id.* (citing 1996 Competition Report at ¶ 157).

Viacom reportedly has already entered into some exclusive distribution agreements.[58]

Second, the dominance of large cable operators affords them power to control independent programming to the detriment of small video providers vying for the same programming. This power creates a danger that cable operators will extract a price from independent programmers for carriage on their systems: exclusivity. Currently, the top four cable operators serve more than 62 percent of all subscribers.[59] At the same time, many of the top 20 most-subscribed-to programs, such as ESPN, USA, Nickelodeon/Nick at Nite, TNN, and A&E, are not covered by the program access rules because they are provided by independent programmers.[60] These programs are among the "must haves" for MVPD subscribers. Large cable operators have the purchasing power to control the supply of this programming. As Congress recognized when it drafted the program access provisions of the 1992 Cable Act, "Programmers either deal with operators on their terms or face the threat of not being carried in that market."[61] Thus, the financial viability of a programmer could be destroyed by choosing to serve all comers, rather than entering into an exclusive arrangement with a large cable operator. Exclusive arrangements could choke off the supply of programming to small providers, rendering them ineffective competitors and ceding the market to incumbent monopolies. Imposition of a rule requiring all programmers to offer non-discriminatory access to their programming would prevent coercion by large cable operators and ensure competitors access to the critical programming necessary to become a viable choice for consumers.

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[58] *See* Statement of Deborah L. Lenart, President, Ameritech New Media, Inc., before the Subcommittee on Antitrust, Business Rights and Competition, United States Senate, Hearing on Competition in the Cable Industry, October 8, 1997 (citing S. Rep. No. 92-102, 102nd Cong., 1st Sess. 25 (1991)) ("Ameritech Senate Testimony") at 7.

[59] *See* 1997 Competition Report at Table E-5.

[60] *See Id.* at F-19.

[61] S. Rep. No. 92-102, 102nd Cong., 1st Sess. 46 (1991).

Finally, an increasing amount of popular programming is sheltered from the program access rules because it is provided by broadcast networks or other powerful non-integrated companies such as Viacom and Disney. For example, the ownership interests of Rupert Murdoch's News Corp., parent company of Fox, include regional sports networks, fX, the Fox News Channel and The Family Channel. NBC owns CNBC and an interest in MSNBC. CBS boasts ownership interests in TNN and Country Music Television, as well as its own cable network, Eye on People.[62] Some of these programmers have reportedly been involved in exclusive contract deals.[63] Although these programmers are not "vertically integrated" within the meaning of Section 628 of the Cable Act, their market power is analogous. They run advertisements on their broadcast and other carried cable networks for programming that is not available to all video providers. Watching this advertising whets consumers' appetites for the unavailable programming. Subscribers to competitive systems who are denied access to that programming then become dissatisfied and often switch back to the incumbent.

Extension of the program access rules to all programming is a necessary step toward ensuring that competition, based on service and price, can flourish. Therefore, the Commission should amend its rules to require all programmers to offer non-discriminatory access to their programming.

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[62] *See* Ameritech Senate Testimony at 8-9.

[63] *See* Ameritech Senate Testimony at 9-10 (citing CBS's intention that Eye on People will not be available to telephone or wireless distributors that compete with cable operators; concerns that MSNBC may similarly restrict its distribution; reports that Fox News Channel offered carriage in certain areas excluding cable overbuilders and wireless providers; and evidence that Fox's fX network currently is available only to franchised cable TV systems).

VII. CONCLUSION

RCN asks the Commission to recognize that access to all programming is a critical tool necessary for competitive video providers to successfully challenge monopoly cable providers. Competitive video providers encounter the same level of difficulty entering markets as competitive local exchange carriers who attempt to compete with the local telephone incumbents. Likewise, cable competitors should be afforded regulatory treatment that similarly favors competitive entry into monopoly markets. Incumbent local telephone providers, for example, must show that their markets are open to local competition before receiving permission to compete in long distance.[64] This scheme recognizes that where monopoly markets exist, it is wise economic and regulatory policy to mitigate monopoly power by providing an environment where competition can take root. In the case of video, it makes sense to provide competitors with the tools necessary to challenge the monopoly power of incumbents, such as access to programming, regardless of how that programming is generated and delivered.

In order to bring robust competition to the video marketplace, the Commission must work to ensure that small competitors can effectively challenge incumbent cable monopolies. To that end, competitors need access to "must have" programming regardless of who produces it or the manner in which it is delivered. The Commission should amend its rules to that end. In order to make cable operators take program access complaints seriously, the Commission should adopt a short time period for the resolution of those complaints and should allow discovery as of right.

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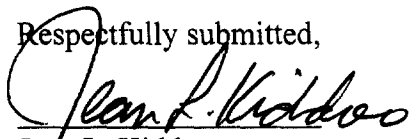
[64] *See* 47 U.S.C. § 271.

Finally, the Commission should put teeth in its rules by imposing meaningful penalties for program access violations.

Respectfully submitted,



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